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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-153

POTOMAC ELECTRIC POWER COMPANY,

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA, PEOPLE'S COUNSEL OF THE DISTRICT OF COLUMBIA,

Respondents.

BRIEF IN OPPOSITION FOR PEOPLE'S COUNSEL

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BRIEF IN OPPOSITION FOR PEOPLE'S COUNSEL

Respondent, People's Counsel of the District of Columbia,[1] respectfully prays that the Petition for Writ of Certiorari in this matter be denied, for the reasons set forth herein.

[1]The People's Council was established by D.C. Code 1977, Supp., § 43-205, as an office within the District of Columbia Public Service Commission, to represent and protect the interests of consumers in matters under the jurisdiction of the Commission.

OPINIONS BELOW

Respondent People's Counsel concurs in the statement made by the petitioner Potomac Electric Power Company on this matter.

JURISDICTION

People's Counsel concurs in the statement made by the petitioner Potomac Electric Power Company on this matter.

QUESTION PRESENTED

Is a constitutional issue warranting review by this Court raised when a public service commission authorizes electric rates based on data from a "test year" selected by the utility and fully examined on the record rather than a later "test year" introduced into evidence but disclaimed by the utility at the time and thus not examined by the other parties?

CONSTITUTIONAL PROVISIONS INVOLVED

People's Counsel is unable to discern any constitutional provisions involved in this petition.

STATEMENT OF THE CASE

People's Counsel would add to petitioner's statement of the case that, in the proceeding before the Commission below, the petitioner (hereafter "PEPCO" or "the

Company") filed its case based upon a calendar 1974 test period. It was upon this basis that the case was tried and decided. Examination and analysis of that 1974 data constitutes the first 2,600 pages out of a total of 2,900 pages of testimony. PEPCO's present complaint stems from the fact that, on July 18, 1975, only five days before the conclusion of the hearing, PEPCO filed what purported to be actual operating results for the twelve months ending June 30, 1975, as part of its "rebuttal" testimony. At that time, PEPCO asked that these data be considered, although it requested that the test period be updated *only* if such updating did not require "a reopening of the record to lay a case . . ." (T. 2659). As the District of Columbia Court of Appeals correctly pointed out, respondents did not have the time to obtain in-depth familiarity with the new data, and therefore did not cross-examine PEPCO's witness in detail on the new information, nor did they recall their witnesses to testify regarding their analysis of the purported 1975 figures. Since PEPCO had disclaimed any intent to rely on that data, the other parties did not seek to obtain the additional discovery that would have been necessary in order to examine the material which purported to reflect 1975 data. The Commission correctly concluded that 1974, the period initially proposed by PEPCO, was the only reasonable test period in the record (T. 2486, 2649-50, 2658-59). This conclusion was eventually upheld by the District of Columbia Court of Appeals.

REASONS FOR DENYING THE WRIT

No Constitutional Issue Has Been Raised Where The Commission Authorized Electric Rates Based On A Test Period Sought By PEPCO Rather Than A Test Period Which PEPCO Disclaimed If It Would Require Delay Or Reopening Of The Record.

The decision of the Public Service Commission of the District of Columbia (hereafter "the Commission"), as affirmed by the District of Columbia Court of Appeals, establishing prospective rates for PEPCO on the basis of an historic test year, was based on explicit findings supported by an ample record. The reasoning which the Commission applied to those findings was fully explicated in its opinion and similarly supported by the record, and the Commission reached a fair and reasonable (if not overgenerous) result. While a different regulatory body or some court of law might have made different judgments, or struck a different balance between investor and consumer interests (if the proceeding had been before that different entity) such a possibility presents no issue of constitutional dimensions. This Court has long recognized that the Constitution does not bind ratemaking bodies to the service of any single formula or combination of formulas. *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942). Even under the standard of ordinary judicial review, the Commission's findings are conclusive as long as they are supported by substantial evidence and are not arbitrary or capricious. See *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 491 (1951); *Williams* v. *Washington Metropolitan Area Transit*

Commission, 415 F.2d 922 (D.C. Cir. 1968) *cert. denied*, 393 U.S. 1081 (1969); *Watergate Improvement Associates* v. *Public Service Commission*, 326 A.2d 778, 783-84 (D.C.App. 1974). A reassessment of a regulatory agency's findings which have clear support on the record is not a function of this Court. The issuance of a writ of certiorari in these circumstances would be improvident.

The only real contention that appears to be made by PEPCO is that the Commission "improperly" utilized the 1974 test year which PEPCO had filed, rather than the 1975 data which PEPCO disclaimed, in setting the rates. It is important to understand the statutory scheme in order to appreciate PEPCO's position in this matter.

The Commission administers the ratemaking process established by the D.C. Code 1973, Title 43 (hereafter "the Act"). It is an elaborate process, by which the Commission examines the complex and shifting relationship among investment, method of operation, and expenses in order to establish rates upon a basis which permits the industry to cover its operating and investment costs and to earn a reasonable rate of return, and which is fair to the consumer. One aspect of this mechanism involves the use of a "test year." Where, as here, a regulatory commission sets rates on the basis of an historic test year (as opposed to a future test year), it uses a period of actual experience which is, or can be made, representative of the future period during which rates will be in effect. To this end, adjustments to the test year are made in order to make normal any abnormal situations existing in the given period. This process necessarily involves matters of judgement, and is

susceptible of a variety of approaches. The Act, therefore, requires that test year data, as well as the underlying assumptions and premises on which that data rests, be subject to a hearing. Under the Act and importantly here, no increased rate can be put into effect until *after* full hearing and decision. § 43-401.

PEPCO's suggestion that, by using 1974 test period data, the Commission made inadequate allowances for the problems of attrition reflected in the 1975 data is factually incorrect. It is of course true that the Commission's final orders must be just and reasonable when reviewed in their entirety. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944). But the petitioner does not view the agency's decision in its entirety, and it fails thereby to meet its "heavy burden of making a convincing showing" that the rates established are confiscatory. *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 *rehearing denied*, 392 U.S. 917 (1968); *Hope, supra* at 602.

A review of the relevant factors would show that the Commission did give some consideration to the 1975 data on the record.[2] Throughout the intricate regulatory process of assessing each factor involved, the Commission made many judgments which were generous to the Company and

[2] The 1975 data on the record showed in part that PEPCO's sales to retail customers had resumed a healthy rate of growth, and that PEPCO had reduced its construction budget.

its investors.[3] In so doing, the Commission acted well within the parameters suggested in *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio*, 294 U.S. 79 (1935), relied on by the petitioner, although it is worth noting that reliance on *West Ohio* is inapposite. In *West Ohio*, the period for which the data were sought to be introduced was part of the period for which prescribed rates were actually in effect, and the case stands for the proposition that, under those circumstances, the actual impact of those rates must be considered in assessing their reasonableness. Rather than assessing the reasonableness of past rates, the case at bar involves selection of a test period for fixing future rates. Moreover, other decisions of this Court make clear that, in selecting an appropriate test year, an agency need not necessarily select the latest possible year, but must select (and to the extent appropriate create therefrom) a representative test year. As this Court held in *ICC* v. *City of Jersey City*, 322 U.S. 503, (1944), an administrative tribunal may decide that updated cost data should not be considerd:

> Administrative consideration of evidence . . . always creates a gap between the time the record is closed and the time the adminsitrative decision is

[3] For example, the Commission used year-end figures, more favorable to the Company than weighted average figures, in computing the plant-in-service, the largest component of the utility's rate base. The Commission used 100% of the weighted average for the construction work in progress component ("CWIP"), as compared with lower amounts used in many regulatory jurisdictions (*e.g.*, 60% in some, 10% in others, and no inclusion at all of CWIP in many jurisdictions). In addition, the Commission made certain adjustments to the 1974 test period to reflect experienced changes in 1975, such as increases in wages and growth receipts tax and changes in capitalization. These changes resulted in more than $4 million of additional revenues to PEPCO.

> promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening. 322 U.S. 514.

Similarly, in *Illinois Commerce Commission* v. *United States*, 292 U.S. 474 (1934), this Court refused to overturn an ICC ratemaking order issued on July 31, 1931, prescribing future rates based upon cost data for the 1926-27 period even though the ICC denied motions for the admission of updated cost studies:

> Whether or not the cost study was representative, whether the study should have been more refined, and whether it should have been supplemented as appellants desired, are questions of fact, the determination of which is within the competence of the Commission. 292 U.S. at 481.

See also, *Morgan* v. *United States*, 304 U.S. 1 (1938) (affirming a 1939 rate order based upon 1933 data, even though it was argued to the Court that post-1933 data should have been used instead); *ICC* v. *City of Jersey City*, *supra* (affirming an administrative tribunal's determination that updated cost data should not be considered).

It is especially ironic that PEPCO here alleges a violation of its due process rights, since the result which the Company seeks — inclusion by the Commission of the first half of 1975 in its test year period — would in fact have resulted in a due process violation of respondents' rights. PEPCO walked a narrow line before the Commission with respect to the 1975 data, hinting that it would like to use an updated test period, but at the same time imploring the Commission not to extend the hearing in order to do so (T. 2649-50, 2658-59). PEPCO would now have the Commission rely on data for the twelve months ending June 30, 1975. No record was developed as to whether that period would be representative of a future period, or whether there are known changes from that period which must be considered in order to "normalize" various revenue and expense items.[4] The Commission could not have adopted these 1975 data without giving full procedural rights to all

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[4] The absence of a full and adequate record regarding the 1975 data makes it impossible to know whether that period properly could have been used by the Commission as a "test year", but there is reason to believe that the 1975 data presented a distortion of PEPCO's true financial picture. The abnormality of a test period ending June 30, 1975 is best demonstrated by the fact that PEPCO's newest and presumably most efficient generating plant — Chalk Point Unit No. 3 — was transferred from construction work in progress ("CWIP") to plant-in-service in May of 1975, along with the $160 million invested therein. However, while all of the start-up costs in this new plant would appear in expenses in the test period rejected by the Commission, virtually none of the revenues in increased earnings resulting from its operation would so appear. The effects of this lack of synchronization are multiplied, moreover, by the fact that revenues and earnings traditionally increase substantially in the summer months when the utility's load is greatest and are substantially higher in the second half of the year than in the first half.

parties in the case including the right to surrebuttal testimony and to full cross-examination after reasonable time for respondents to analyze the new submissions and to obtain discovery theron.[5] The Courts have long recognized that due process damands no less. See, *e.g.*, Morgan v. *United States*, 304 U.S. 1 (1938). PEPCO was fully aware of this at the time of the hearing, and although it did introduce the 1975 data, it did not wish to risk the delay which a hearing on that data would require. For this reason PEPCO was perfectly willing to have rates expeditiously established on a 1974 test year basis, rather than face substantial delay with a 1975 test year. PEPCO now seeks to have its cake and eat it too; it seeks to have rates established on the basis of untested data which it disclaimed if such data were to be the subject of a hearing process, while at the same time to increase its rates well prior to the time such increase would have been effective if the new evidence had been allowed and the necessary hearing had been held.

The new approach suggested by PEPCO would reach ludicrous results. If a hearing had been held on the first-half of 1975 data, the Company might have interposed second-half of 1975 figures at the conclusion of that hearing, thus necessitating renewed hearings on that second-half data. The Commission would be in the impossible position of either continuing hearings indefinitely to consider constantly updated data, or of

[5] It may be said, moreover, that the Commission was generous with PEPCO even to permit the introduction of such evidence, for by definition, rebuttal evidence is limited to that which responds to testimony or facts introduced by or on behalf of an adverse party. PEPCO's 1975 date did not meet this test.

violating respondents' due process rights by terminating the hearings and relying on data which is untested and unchallenged on the record. The fair administration of the regulatory process does not demand such absurd results.

As petitioner itself notes, "[t]he issues have been thoroughly and forcefully explored below," (Petition at 16), and it is not the function of this Court to act as a super-regulatory agency, reassessing each decision as to methodology and each conclusion of fact. Utility rate making is a delicate and sophisticated process particularly suited to the application of a regulatory agency's technical ability and expertise. When that expertise has been exercised, as in this case, upon a full and complete record, and when its findings and conclusions are amply supported in that record, there remains no legitimate role for the courts.

CONCLUSION

The Public Service Commission of the District of Columbia, in selecting 1974 data as a test period upon which to base PEPCO's electric rates, made the only selection which was factually warranted and constitutionally permitted. The resulting rates were just and reasonable, and there is no violation of PEPCO's rights which would warrant the issuance of a writ of certiorari. For these reasons, People's Counsel respectfully urges that this Court deny the petition for a writ of certiorari to the District of Columbia Court of Appeals.

Respectfully submitted,

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